

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFFREY GREGOIRE)	
Claimant)	
VS.)	
)	Docket Nos. 154,660; 162,612;
THE BOEING COMPANY - WICHITA)	and 176,501
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and its insurance carrier appeal from an Award rendered by Administrative Law Judge Shannon S. Krysl on August 31, 1994.

APPEARANCES

Claimant appeared by and through his attorney Michael L. Snider, Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney Frederick L. Haag, Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Cortland Q. Clotfelter, Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The file also contains a deposition of Mr. Jerry Hardin taken in 1991. Neither party submitted this deposition as part of the record and the Administrative Law Judge did not list this deposition as part of the record. The Award refers on page 7 to the opinion of Jerry Hardin but it appears the Administrative Law Judge meant Mr. Molski and was using the opinion of Mr. Molski. For these reasons the deposition of Mr. Hardin has not been considered on appeal. The Appeals Board has adopted the stipulations listed in the Award.

ISSUES

This appeal involves three separately docketed claims. Docket No. 154,660 involves an injury of October 1, 1990 to claimant's right shoulder and is presented here on claimant's application for review and modification of an original Award of ten percent (10%) permanent partial disability based upon functional impairment to a thirty-six and one-half percent (36.5%) permanent partial work disability. Docket No. 162,612 involves an aggravation to claimant's right shoulder injury which occurred on January 23, 1992. The Administrative Law Judge awarded medical and temporary total disability benefits for a temporary aggravation only and found no additional permanent impairment. One hundred percent (100%) of the benefits awarded under this docket number were assessed against the Kansas Workers Compensation Fund. Docket No. 176,501 involves a claim for bilateral carpal tunnel syndrome occurring on August 26, 1992 and each and every day thereafter until August 31, 1993 when claimant was laid off. The nature and extent of disability was listed as an issue on each of the docketed claims and Fund liability was listed only on Docket No. 162,612.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board makes the following findings and conclusions:

AWARD OF REVIEW AND MODIFICATION DOCKET NO. 154,660

Claimant sustained an injury to his right shoulder on October 1, 1990, while moving insulation blankets out of a 747 jet ceiling. After the treatment, which included arthroscopic surgery and acromioplasty as well as follow up physical therapy, claimant returned to work at a wage comparable to the wage he was earning prior to the injury. On January 9, 1992, the Administrative Law Judge David V. Jackson entered an Award in favor of the claimant for ten percent (10%) permanent partial disability to the body as a whole. Claimant was awarded functional impairment only because he had returned to work at a comparable wage. Claimant here requests review and modification effective August 31, 1992, the date claimant was laid off from employment.

In accordance with Lee v. The Boeing Company - Wichita, __ Kan. App. 2d __ (1995) the Appeals Board finds the review and modification to be appropriate. At the time of the

layoff, claimant became entitled to benefits for a work disability. James Molski and Maurice Entwhistle gave opinions relating to claimant's loss of access to the labor market and loss of ability to earn a comparable wage. The Administrative Law Judge averaged the opinions of those two experts to arrive at a twenty-two percent (22%) loss of access to the labor market. The Appeals Board agrees with this finding. It appears this finding ignores consideration of the opinion of Mr. Molski based on Dr. Schlachter's restrictions that claimant lost twenty-five to thirty percent (25-30%) access to the open labor market. Addition of this opinion and giving it equal weight would modify the finding by slightly more than one percent.

The Administrative Law Judge also found a loss of ability to earn a comparable wage of fifty-one percent (51%) at the time of lay off. This figure also represents an average of the wage loss opinions of James Molski and Maurice Entwhistle. After reviewing the facts relevant to this finding, the Appeals Board concludes this finding may not have, in all cases, used percentages which compared post lay off wage to claimant's stipulated average weekly wage. However, adjustment gives a net change of one percent. For the first right shoulder injury, Docket No. 154,660, the parties stipulated to an average weekly wage of \$670.83. Mr. Molski projected a wage post lay off of \$6-\$7 per hour. Compared to \$670.83 this gives a fifty-eight to sixty-four percent (58-64%) wage loss. Mr. Entwhistle projected a \$7.50 wage after the lay off for a forty-three percent (43%) wage loss compared to \$670.83 per week. These averaged together give a wage loss of fifty-two percent (52%) rather than the fifty-one percent (51%) finding.

The Appeals Board agrees that the wage loss and labor market factors should be given equal weight. The differences noted above yield a net difference of approximately one percent from the disability finding by the Administrative Law Judge. The Appeals Board concludes the thirty-six and one-half percent (36.5%) found by the Administrative Law Judge appropriately rates claimant's disability and the above minor differences in this calculation do not warrant change in the Award. Accordingly, the Appeals Board finds claimant has a thirty-six and one-half percent (36.5%) permanent partial general body disability.

FINDINGS AND CONCLUSIONS RELATING TO DOCKET NO. 162,612

With regard to the reinjury to claimant's right shoulder on January 1, 1992, the Appeals Board agrees with the conclusion by the Administrative Law Judge that claimant suffered a temporary aggravation only for which he is entitled to medical benefits and temporary total disability payments. In this case, respondent paid a total of \$8,516.25 in medical benefits and \$1,156.00 in temporary total disability benefits for the January 23, 1992 injury. The evidence that this resulted in temporary aggravation only is essentially uncontradicted testimony of both Dr. Schlachter and Dr. Lesko.

The Appeals Board also finds and agrees with the conclusion that the Kansas Workers Compensation Fund should be liable for one hundred percent (100%) of the benefits awarded under Docket No. 162,612. Respondent knew of claimant's handicap

from the injury of October 1, 1990 and Dr. Schlachter gave uncontradicted testimony that the injury of January 23, 1992 would not have occurred but for the preexisting handicap. The Appeals Board, therefore, affirms the award of these benefits on Docket No. 162,612 against the Kansas Workers Compensation Fund.

FINDINGS AND CONCLUSIONS RELATING TO DOCKET NO. 176,501

The Appeals Board finds that the issues relating to Docket No. 176,501 should be remanded. In this claim, claimant asserts the bilateral carpal tunnel condition developed over a period of time ending when claimant was laid off on August 31, 1992. In accordance with the holding in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220 (1995), the date of accident for this injury should be August 31, 1993. Accordingly, new Act definitions and methods of computing impairment apply. K.S.A. 44-510e.

At the time this claim was submitted and at the time the Award was rendered, the Kansas Supreme Court had not issued its decision in Berry v. Boeing Military Airplanes, *supra*. The record indicates the parties and the Administrative Law Judge acted on the premises that definitions and methods of computing disability prior to July 1, 1993 applied to the claim for bilateral carpal tunnel syndrome. Accordingly, the parties did not present evidence relating to disability as computed under the Act effective July 1, 1993. No evidence is presented of loss of ability to perform tasks. Although it appears that claimant was not earning a wage after August 31, 1993, the actual wage takes on increased importance under the new Act. Both respondent and claimant may have relied upon evidence of claimant's ability as established by the vocational experts. Because of this misunderstanding about the applicable law, the Appeals Board finds it appropriate to remand this case to afford the parties an opportunity to present evidence relating to disability under the Act applicable to this claim for a date of accident of August 31, 1993.

AWARD OF REVIEW AND MODIFICATION DOCKET NO. 154,660

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Jeffrey Gregoire, and against the respondent, The Boeing Company, and the insurance carrier, Aetna Casualty & Surety Company, and the Workers Compensation Fund, for an accidental injury sustained on October 1, 1990 with original award of 1/9/92 and layoff of 8/31/93.

As of August 30, 1994 the claimant is entitled to amount paid on previous award of January 9, 1992 plus 52.14 weeks permanent partial compensation at \$163.24 per week in the sum of \$8,511.33 for a 36.5% permanent partial general body disability. Thereafter, the remaining balance in the amount of \$43,142.70 shall be paid at \$163.24 per week for 264.29 weeks or until further order of the Director.

AWARD DOCKET NO. 162,612

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award for Docket No. 162,612 of Administrative Law Judge Shannon S. Krysl, dated August 31, 1994, shall be, and hereby is, affirmed.

AWARD DOCKET NO. 176,501

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award for Docket No. 176,501 of Administrative Law Judge Shannon S. Krysl, dated August 31, 1994, should be and is hereby remanded to afford the parties an opportunity to present evidence relating to disability under the Act applicable to this claim for a date of accident of August 31, 1993.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas
Cortland Q. Clotfelter, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director